

§3.D.00 | APPELLATE ATTORNEYS' FEES⁹⁴

A party that seeks to recover appellate attorneys' fees must file a timely motion for fees under Florida Rule of Appellate Procedure 9.400(b).⁹⁵ This Rule outlines the method of obtaining appellate attorneys' fees but does not provide an independent basis for an award of fees.⁹⁶ In appellate courts, as in trial courts, the right to attorneys' fees is a substantive right that is created by statute or by agreement of the parties.⁹⁷

Unlike a motion to tax appellate costs, which is filed in the lower tribunal, a motion for appellate attorneys' fees must be filed in the appellate court.⁹⁸ If the appellate court determines that the moving party is entitled to an award of appellate attorneys' fees, the court may set the amount of fees based on affidavits or may remand the case to the lower tribunal for the assessment of an appropriate amount.⁹⁹ The lower tribunal lacks jurisdiction to determine entitlement to appellate attorneys' fees unless a case has been remanded for that purpose.

A motion for appellate attorneys' fees must be served no later than the time for service of the reply brief.¹⁰⁰ This general time requirement applies to appellees even though an appellee ordinarily would not have an opportunity to file a reply brief. The time limitation is keyed to the filing of the reply brief so that the motion will be available by the time the case is ready for consideration on the merits.

In the past, some lawyers simply included a motion for appellate attorneys' fees as a part of a brief, but this is not an acceptable practice. The motion must be submitted to the court as a separate document so that it can be identified and docketed.¹⁰¹ A motion for appellate attorneys' fees must meet all of the general requirements that apply to appellate motions, and it also must contain a statement of the substantive ground for an award of fees.¹⁰² If the motion is based on a statutory ground, it should refer to the applicable statute and any applicable case law interpreting the statute.¹⁰³ Similarly, if the attorneys'-fee motion is based on an agreement in a note or contract, the pertinent document should be attached to the motion or cited from the record.

In family-law cases, an attorneys'-fee motion also should contain a statement about the financial needs of the moving party and the ability of the opposing party to pay. An allegation regarding the needs and abilities of the parties is necessary in familylaw cases because appellate attorneys' fees in such cases are not based on

the outcome of the case.¹⁰⁴ If the needs-and-ability determination previously has been made in the lower court or by the appellate court, the facts relating to that determination should be set out clearly in the motion.

Appellate attorneys' fees often are awarded provisionally in family-law cases on the basis of a prior judicial determination with the understanding that the lower court will assess the need for a fee award after considering any changes in the parties' financial circumstances.¹⁰⁵ A provisional award of appellate attorneys' fees in a family-law case does not always determine the issue of entitlement to fees.¹⁰⁶ Such an order merely signifies that there is a basis for a claim of attorneys' fees and directs the lower tribunal to consider the issue on remand. When the needs-and-ability test is applied on remand in view of the current financial status of the parties, the trial court may determine that it is inappropriate to award appellate attorneys' fees.

Family-law cases are unique in that they may involve an award of attorneys' fees pending an appeal. Rule 9.600(c)(1) states that the trial court has continuing jurisdiction to award and enforce temporary attorneys' fees in family-law matters.¹⁰⁷ An order awarding temporary attorneys' fees pending an appeal or review proceeding is itself subject to review in the appellate court. Rule 9.600(c)(3) provides that a party may seek review of a temporary attorneys'-fee order by filing a motion in the appellate court within thirty days of rendition of the order.¹⁰⁸ As with the final determination, an order awarding temporary appellate attorneys' fees in a family-law matter is based primarily on the needs-and-ability determination.

A party may oppose a motion for attorneys' fees on appeal or review by serving a response in the appellate court within ten days of service of the motion.¹⁰⁹ If the motion for appellate attorneys' fees was served by mail, the opposing party has an additional five days to serve the response.¹¹⁰ A response may be employed to refute the existence of a substantive ground for an award of attorneys' fees, or it may be filed simply to oppose the award of fees in the amount requested by the moving party.

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Footnotes

⁹⁴. See Padovano, *supra* n. 1, at ch. 20 for the source of the material that is adapted in this Subsection.

⁹⁵. Fla. R. App. P. 9.400(b).

⁹⁶. *Id.*

⁹⁷. *United Servs. Auto. Assn. v. Phillips*, 775 S.2d 921, 922 (Fla. 2000); *Judges of the Eleventh Jud. Cir. v. Janovitz*, 635 S.2d 19, 20 (Fla. 1994).

⁹⁸. Fla. R. App. P. 9.400(b). The lower tribunal has no authority to award appellate attorneys' fees in the absence of a mandate from the appellate court. *Rados v. Rados*, 791 S.2d 1130, 1131 (Fla. Dist. App. 2d 2001); *Computer Task Group, Inc.*, 809 S.2d at 11. The need to file a motion under Rule 9.400(b) is not excused merely because the applicable statute is couched in mandatory terms directing that the court shall award fees to the prevailing party. *Sch. Bd. of Alachua County v. Rhea*, 661 S.2d 331, 332 (Fla. Dist. App. 1st 1995); *Respiratory Care Servs., Inc. v. Murray D. Shear, P.A.*, 715 S.2d 1054, 1056 (Fla. Dist. App. 5th 1998).

⁹⁹. In *Sierra v. Sierra*, 505 S.2d 432, 434 (Fla. 1987), the Court decided that an award of appellate attorneys' fees must rest on an evidentiary basis. After the appellate court has ruled that a party is entitled to fees, the correct procedure is to remand the case for an evidentiary hearing on the amount of fees or allow the parties to present evidence directly to the appellate court in the form of affidavits. *Id.* Hence, the amount of appellate attorneys' fees usually is determined in the lower tribunal. *Moldthan v. Sentinel Commun. Co.*, 510 S.2d 1185, 1189 (Fla. Dist. App. 1st 1987); *Henning v. Henning*, 507 S.2d 164, 165 (Fla. Dist. App. 3d 1987); *Taggart Corp. v. Benzing Corp.*, 451 S.2d 1046, 1047 (Fla. Dist. App. 4th 1984). A remand to the lower court to determine the proper amount of appellate attorneys' fees does not open the issue of entitlement to fees. *Hernstadt v. Brickell Bay Club Condo. Assn., Inc.*, 602 S.2d 967, 968 (Fla. Dist. App. 3d 1992). If the appellate court has granted appellate attorneys' fees, the lower court subsequently cannot determine that the moving party is not entitled to fees. *Id.* In some cases it may be necessary for the trial court to determine the amount of fees only for the successful portion of the appeal. *Imperial Terrace E. Homeowners' Assn., Inc. v. Grimes*, 666 S.2d 276, 277 (Fla. Dist. App. 5th 1996).

¹⁰⁰. Fla. R. App. P. 9.400(b); *Antennas for Commun. v. Compton*, 482 S.2d 610, 610 (Fla. Dist. App. 1st 1986); *Joseph Land & Co. v. Green*, 486 S.2d 87, 87 (Fla. Dist. App. 1st 1986); *Computer Task Group, Inc.*, 809 S.2d at 11. In *Lobel v. Southgate Condominium Association, Incorporated*, 436 S.2d 170 (Fla. Dist. App. 4th 1983), the court denied a motion for attorneys' fees filed more than five months after the date of service of the reply brief. *Id.* at 171. The court said, "Increasingly we note a tendency to seek attorney[s'] fees out of season." *Id.*

¹⁰¹. *Melweb Signs, Inc. v. Wright*, 394 S.2d 475, 477 (Fla. Dist. App. 1st 1981); *McCreary v. Fla. Residential Prop. & Casualty Jt. Underwriting Assn.*, 758 S.2d 692, 696 (Fla. Dist. App. 4th 1999).



¹⁰². Fla. R. App. P. 9.400(b). Rule 9.400(b) provides that a motion for appellate attorneys’ fees “shall state the grounds on which recovery is sought.” A motion that fails to state the ground upon which recovery is sought is insufficient. United Servs. Auto. Assn., 775 S.2d at 922; Shuler v. Darby, 786 S.2d 627, 630 (Fla. Dist. App. 1st 2001). The presence of a statute creating the entitlement to fees does not relieve the parties of their obligation under Rule 9.400(b) of filing a timely motion for attorneys’ fees in the appellate court. See supra n. 23 and accompanying text (discussing time requirement for filing a motion for attorneys’ fees).

¹⁰³. A motion for appellate attorneys’ fees based on a statutory ground “should refer to the statute, as well as specifying the appropriate sections and subsections of the statute, along with the year of the statute.” Lehigh Corp. v. Byrd, 397 S.2d 1202, 1205 (Fla. Dist. App. 1st 1985).

¹⁰⁴. A motion for appellate attorneys’ fees in a family-law case should contain an allegation concerning needs and ability. Rosen v. Rosen, 696 S.2d 697, 699–700 (Fla. 1997). Appellate attorneys’ fees in family-law cases are not limited to the prevailing party, and may be awarded, in the discretion of the appellate court, on the basis of the needs of one spouse and the financial ability of the other, and to a lesser extent on other factors such as the length and scope of the litigation and the parties’ behavior during the litigation. *Id.* at 700–701; see generally Rados, 791 S.2d at 1131–1135 (providing a detailed discussion of attorneys’ fees on appeal in family-law cases).

¹⁰⁵. The practice of provisionally awarding appellate attorneys’ fees, subject to a post-mandate hearing in the lower tribunal, was popularized by Dresser v. Dresser, 350 S.2d 1152, 1154 (Fla. Dist. App. 1st 1977). At least one appellate court has modified the procedure to delegate the determination of a party’s entitlement to fees to the trial court in certain circumstances, subject to review by the appellate court by motion. Rados, 791 S.2d at 1131.

¹⁰⁶. White v. White, 695 S.2d 381, 383 (Fla. Dist. App. 4th 1997).

¹⁰⁷. Fla. R. App. P. 9.600(c)(1). According to Rule 9.600(c)(1), the lower court has continuing jurisdiction to enter and enforce orders awarding temporary attorneys’ fees to prosecute or defend an appeal in a family-law matter. See Swartz v. Swartz, 691 S.2d 2, 3 (Fla. Dist. App. 3d 1996) (applying Rule 9.600 in a dissolution-of-marriage action). Such an order is then subject to review in the appellate court under Rule 9.600(c)(3). White v. White, 683 S.2d 510, 511 (Fla. Dist. App. 4th 1996). The opportunity for temporary attorneys’ fees is limited to family-law actions under Chapter 61 of the Florida Statutes. Consequently, a party is not entitled to temporary appellate attorneys’ fees in an action to establish paternity. Gilbertson v. Boggs, 743 S.2d 123, 128 (Fla. Dist. App. 4th 1999).

¹⁰⁸. Fla. R. App. P. 9.600(c)(3).

¹⁰⁹. *Id.* 9.300(a). Failure to serve a timely response to a motion for appellate attorneys’ fees may be treated as a waiver of the right to oppose an award of fees. Homestead Ins. Co. v. Poole, Masters & Goldstein, C.P.A., P.A., 604 S.2d 825, 827 (Fla. Dist. App. 4th 1991).

¹¹⁰. Fla. R. App. 9.420(d); see text accompanying supra n. 59 (noting that responses to motions in appellate courts must be served “within ten days of service of the motion”).